PD-0776-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
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SAMUEL UKWUACHU,	§	
Respondent	§	
	§	
	§	
vs.	§	**NO. PD-0776-19**
	§	
	§	
THE STATE OF TEXAS,	§	
Petitioner	§	

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REPLY TO STATE'S PETITION FOR DISCRETIONARY REVIEW OF THE COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS NUMBER 10-15-00376-CR

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FOR THE STATE OF TEXAS
AUSTIN, TEXAS

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OF THE COURT OF APPEALS FOR THE
TENTH DISTRICT OF TEXAS
NUMBER 10-15-00376-CR

* * * * * * * * * * * * * * * * *

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES **SAMUEL UKWUACHU**, Respondent herein and respectfully replies to the petition to the Honorable Court to review the Opinion of the Court of Appeals for the Tenth District of Texas at Waco.

CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of Record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualification or recusal.

District Judge	Honorable Matt Johnson 54th District Court of McLennan County Judge
Petitioner	The State of Texas
Respondent	Samuel Ukwuachu
Attorney for Respondent	William A. Bratton III, Dallas, Texas (on appeal only) Jonathon P. Sibley, Waco, Texas (at trial)
Attorney for the Petitioner	Barry Johnson, Criminal District Attorney McLennan County, Texas

STATEMENT REGARDING ORAL ARGUMENT

Texas Rule of Appellate Procedure 39.1 states:

A party who has filed a brief and who has timely requested oral argument may argue the case to the court unless the court, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:

(a) the appeal is frivolous;

(b) the dispositive issue or issues have been authoritatively decided;

(c) the facts and legal arguments are adequately presented in the briefs and record; or

(d) the decisional process would not be significantly aided by oral argument.

Petitioner would urge the court that none of the reasons to grant oral argument set forth in Tex. R. App. Proc. 39.1 apply to the instant appeal. The factual issues in the appeal, as applied to the legal standards, are clear and properly decided.

STATEMENT OF THE CASE

SAMUEL UKWUACHU, hereinafter referred to as Respondent, was charged by indictment in McLennan County, Texas with the offense of sexual assault. Respondent was tried in the 54th District Court on his plea of not guilty to the jury on August 17 through August 21, 2015. The jury found the Respondent guilty of the offense of sexual assault and assessed punishment at eight (8) years confinement in the Texas Department of Criminal Justice – Institutional Division and no fine. Further, the jury granted the Respondent's application for community supervision and recommended that the term of imprisonment be suspended and the Respondent placed on community supervision. The court-imposed sentence, followed the jury's recommendation, and set the term of community supervision at ten (10) years, as well as adding the condition that the Respondent serve 180 days in the McLennan County Jail. Notice of Appeal was timely filed by the Respondent. The Court, on March 22,2017, in a Memorandum Opinion, reversed the Respondent's judgment of conviction based on the issues raised in this brief on original submission. On June 6, 2018, on State's Petition for Discretionary Review, the Court of Criminal Appeals issued three (3) opinions reversing the decision of this Court and remanded the cause for further proceedings. The Court, on July 10, 2019, in

a Memorandum Opinion, again reversed the Respondent's judgment of conviction based on the issues raised in this brief on original submission. On July 26, 2019 the Petitioner filed State's Petition for Discretionary Review.

STATEMENT OF PROCEDURAL HISTORY

On July 10, 2019, the Court of Appeals for the Tenth District of Texas at Waco reversed the judgment of conviction and remanded the case to the trial court for a new trial. (See Appendix "A"). No Motion for Rehearing was filed. On July 26, 2019, the State filed a Petition for Discretionary Review.

GROUNDS FOR REVIEW

I.

The Court of Appeals' decision correctly held the State's use of unadmitted telephone records during cross-examination of witnesses Tagive and Reed created a false impression with the jury and violated the respondent's due process rights guaranteed by the Fifth and Fourteenth amendments to the United States Constitution and article 1 section 19 of the Texas Constitution (R.R.XI 16, 30-32)

II.

The Court of Appeals' decision correctly conducted a proper harm analysis based on the State's improper use of the unadmitted evidence during cross-examination of witnesses Tagive and Reed, and did not depart from the accepted and usual course of judicial proceedings.

ARGUMENT

I.

The Court of Appeals' decision correctly held the State's use of unadmitted telephone records during cross-examination of witnesses Tagive and Reed created a false impression with the jury and violated the respondent's due process rights guaranteed by the Fifth and Fourteenth amendments to the United States Constitution and article 1 section 19 of the Texas Constitution (R.R.XI 16, 30-32)

STATEMENT:

Morgan Reed gave Ratu Peni Tagive a ride home to his apartment following the homecoming party at the Convention Center in Waco, Texas on October 20, 2013. Ratu Peni Tagive was the roommate of the Respondent in a two-bedroom apartment. Morgan Reed testified that she took Mr. Tagive to that apartment at approximately 1:00 to 1:30 a.m. on October 20, 2013 and left him there. She testified that on her way home she received a text or call from Mr. Tagive to thank her for the ride. On cross-examination, the prosecutor questioned Ms. Reed about the truthfulness of her testimony based on the telephone records of Mr. Tagive which the State inferred proved he was across town when he placed the call or text to her. The telephone records were not introduced into evidence nor substantiated as to the location of a telephone at the time a call or text was originated. The

cross-examination created a false impression with the jury that Mr. Tagive was placing a call or text to Ms. Reed from a location other than his apartment. No such evidence of the location of Mr. Tagive's telephone was ever introduced into evidence during trial.

ARGUMENT:

On the second day of trial, the prosecutors stated that they had received, that morning, the telephone records of Ratu Peni Tagive (R.R.X 13). The Respondent was unaware of the telephone records of Mr. Tagive and had never seen those when the prosecutor announced that they had received the records that day (R.R.X 14). Outside the presence of the jury, the prosecutor stated that the phone records did not support Mr. Tagive's statements as to his location on the early morning hours of October 20, 2013 (R.R.X 14). At that time, the court instructed the prosecutors to turn the phone records over to the Respondent. (R.R.X 14).

Respondent then advised the court that Mr. Tagive was intended to be called as a witness during the defense case (R.R.X 15). The prosecutor stated that Mr. Tagive's attorney advised he would probably plead the Fifth Amendment based on the records (R.R.X 14). Respondent stated that in fairness he would need time to look at the records and requested a delay in the proceedings (R.R.X 16). The prosecutor advised the Respondent that the

prosecutor could tell him "in thirty seconds what they show" (R.R.X 16). The prosecutor further stated that Mr. Tagive "told us in the Grand Jury that he had his phone with him and he had been asleep all night. And so that does not match his testimony....." (R.R.X 16). The Respondent questioned the "science" necessary to show the location of a call using the records without an expert (R.R.X 59-61).

Ultimately the court agreed to give the Respondent the afternoon to "research the records" (R.R.X 63). The prosecutor opposed the delay for the afternoon since he believed through the attorney for Ratu Peni Tagive that he was going to "take the Fifth" (R.R.X 64).

The next morning, Respondent filed a Second Motion in Limine directed at the telephone records of Mr. Tagive (C.R. 585; R.R.XI 7). The Second Motion in Limine requested that they not be mentioned in court prior to the parties approaching the bench and determining their admissibility (R.R.XI 7). The prosecutor responded that they were business records (R.R.XI 7). The Respondent pointed out that there was no business records affidavit timely filed to allow their admission (R.R.XI 8). Further, Respondent noted that the times listed on the business records were 5 hours off from the actual time in Waco, Texas and did not contradict the timing of telephone calls of Mr. Tagive (R.R.XI 8). The prosecution still maintained

there was conflict with what Mr. Tagive's testimony was and believed there was "good faith reason to ask those questions about where - - if he says he's home and bed asleep at 12:30 and making phone calls at 2:00 in the morning I think there is a good reason to ask why his business...why his phone records show that" (R.R.XI 8). The court ruled that the phone records were not going to be admitted as a business record (R.R.XI 9). The court ruled that the prosecutor can "ask him if he was making phone calls" (R.R.XI 9).

At the Motion for New Trial hearing, Defendant's Exhibit #2 was admitted into evidence (R.R.XIV 8). Defense Exhibit #3 is the Affidavit of Dan James who provided Curriculum Vitae along with his Affidavit establishing his qualifications as a Computer Forensic Examiner and Criminal Investigator (R.R.XV Def.Exh.2). Mr. James affidavit demonstrated that the longitude and latitude figures provided on the mobility usage are rarely accurate (R.R.XV Def.Exh. 2). That it would take an expert a number of hours to evaluate the records and cell tower locations in order to make a final determination on whether the longitude and latitude listed is accurate (R.R.XV Def.Exh. 2). Further, without proper training and expertise necessary in order to properly evaluate the accuracy of records, any use of those records would be reckless and without any factual basis (R.R.XV Def.Exh. 2).

Morgan Reed, a student at Baylor, testified that she knew C.W. from her freshman year when they lived in the same apartment complex (R.R.XI 23-25). On homecoming night of 2013, Ms. Reed received a phone call around midnight from Mr. Tagive to get a ride from a party at the Convention Center (R.R.XI 25). Ms. Reed picked Mr. Tagive up around 12:30, they went to get something to eat and then back to his apartment (R.R.XI 26). After returning Mr. Tagive to his apartment, Ms. Reed stayed until about 1:00 to 1:30 a.m. when she left (R.R.XI 26). After she left, Mr. Tagive texted or called her thanking her for the ride (R.R.XI 27).

On cross examination of Ms. Reed, the prosecution questioned Ms. Reed by asking "why are you calling him at 1:00 a.m. according to his phone records? Why is he calling you from across town at 1:00 a.m. far away from his apartment?" (R.R.XI 30). An objection is registered to this question by the Respondent after which an off the record bench conference with the court and counsel was conducted (R.R.XI 30).

The prosecutor then asked a question "Can you tell this jury why your phone records show he called you at 1:00 from across town from his apartment?" (R.R.XI 30). Ms. Reed stated that she did not believe that was true (R.R.XI 30). The prosecutor went on and confirmed her telephone number and then continued to ask a question that Ratu Peni Tagive made

calls at 1:00 from across town and why this does not match her testimony (R.R.XI 31).

With respect to the substantive analysis of a due-process false-evidence claim, it is recognized that the use of materially false evidence to procure a conviction violates a defendant's due-process rights under the Fifth and Fourteenth amendments to the United States Constitution. *See* **Ex parte Weinstein**, 421 S.W.3d 656, 664 (Tex.Crim.App. 2014); **Ex parte Chavez**, 371 S.W.3d 200, 207 (Tex.Crim.App. 2012) *see also* U.S. Const. amend. V, XIV; **Napue v. Illinois**, 360 U.S. 264 (1959); **Mooney v. Holohan**, 294 U.S. 103 (1935). A conviction based on such materially false evidence results in a due-process violation, regardless of whether the falsity of the evidence is known to the State at the time of trial. **Ex parte Ghahremani**, 332 S.W.3d 470, 478 (Tex.Crim.App. 2011); **Ex parte Robbins**, 360 S.W.3d 446, 460 (Tex.Crim.App. 2011). In order to be entitled to relief on the basis of false evidence, a defendant must show that (1) false evidence was presented at his trial and (2) the false evidence was material to the jury's verdict of guilt. *See* **Weinstein**, *supra*.

In determining whether a particular piece of evidence has been demonstrated to be false, the Courts have explained that the relevant question is whether the testimony, taken as a whole, gives the jury a false

impression. **Ghahremani**, *supra* (agreeing with convicting court's determination that evidence was false because it " creat[ed] a misleading impression of the facts"); *see also* **Alcorta v. Texas**, 355 U.S. 28 (1957) (evidence is false if it leaves jury with a " false impression"). " [I]mproper suggestions, insinuations and, especially, assertions of personal knowledge constitute false testimony." **Robbins**, *supra*. The Courts has consistently held that testimony " need not be perjured to constitute a due process violation; rather it is sufficient that the testimony was false." **Chavez**, *supra* (citing **Robbins**, *supra*). That is because a false-evidence due-process claim is " not aimed at preventing the crime of perjury--which is punishable in its own right--but [is] designed to ensure that the defendant is convicted and sentenced on truthful testimony." **Weinstein**, *supra*.

II.

The Court of Appeals' decision correctly conducted a proper harm analysis based on the State's improper use of the unadmitted evidence during cross-examination of witnesses Tagive and Reed, and did not depart from the accepted and usual course of judicial proceedings.

Tex. R. App. Proc. 33.1 establishes the general requirement that a contemporaneous objection must be made to preserve error for appeal. However in **Marin v. State**, 851 S.W.2d 275, 278 (Tex. Crim. App. 1993),

the Court of Criminal Appeals held that the general preservation requirement does not apply to all claims. In **Marin** the court separated the rights of a defendant into three categories:

The first category of rights are those that are "widely considered so fundamental to the proper functioning of our adjudicatory process . . . that they cannot be forfeited . . . by inaction alone." These are considered " absolute rights."

The second category of rights is comprised of rights that are "not forfeitable" --they cannot be surrendered by mere inaction, but are "waivable" if the waiver is affirmatively, plainly, freely, and intelligently made. The trial judge has an independent duty to implement these rights absent any request unless there is an effective express waiver.

Finally, the third category of rights are "forfeitable" and must be requested by the litigant. Many rights of the criminal defendant, including some constitutional rights, are in this category and can be forfeited by inaction.

Rule 33.1's preservation requirements do not apply to rights falling within the first two categories. Rather than existing in conflict with one another, **Rule 103(e)Texas Rules of Evidence**, **Jasper v. State**, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001), and **Marin** all stand for the same uncontroversial proposition: Some rights are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system. The "fundamental error[s]" described in Rule 103(e) and **Jasper** are simply category-one and two Marin errors. **Proenza v. State**, 541 S.W.3d 786 (Tex. Crim. App. 2017).

It is Respondent's position that the error is either a first or second category **Marin** error. It is widely considered to be fundamental to the proper functioning of our adjudicatory process that the prosecution not create a false impression to the jury. The Constitution requires introduction of only otherwise relevant and admissible evidence. **Hale v. State**, 140 S.W.3d 381, 396 (Tex.App.-Fort Worth 2004, pet. ref'd).

If the trial court's error is not constitutional, then **TEX.R.APP. P. 44.2(b)** applies. A non-constitutional error must be disregarded unless it affects the substantial rights of the accused. **Pollard v. State**, 255 S.W.3d 184, 190 (Tex.App.-San Antonio 2008), aff'd, 277 S.W.3d 25 (Tex.Crim.App.2009). "To make this determination, [the court] must decide whether the error had a substantial or injurious effect on the jury verdict... substantial rights are not affected by the erroneous admission of evidence if, after examining the record as a whole, we have a fair assurance that the error did not influence the jury, or had but a slight effect." **Pollard**, supra.

In assessing the degree of the impact of a non-constitutional error on the jury's verdict, the court should consider the entire record, including: (1) all physical evidence and testimony; (2) "the nature of the evidence supporting the verdict"; and (3) the nature of the error and how the erroneously admitted evidence "might be considered in connection with

other evidence in the case." see also **Motilla v. State**, 78 S.W.3d 352, 355-56 (Tex.Crim.App.2002). The court may also consider: (4) the jury instructions; (5) the parties' respective theories and closing arguments; and (6) voir dire, if applicable. **Motilla**, supra.

The telephone records of Ratu Peni Tagive that were obtained by the prosecution on the second morning of trial and given to the Respondent on that day were never sponsored into evidence nor explained by a person qualified to interpret the records. The Affidavit of Mr. James clearly demonstrates that until they were interpreted by a person who spent the necessary time with the proper expertise, could not be used as any basis of establishing a fact. The prosecution used the records as if they proved that Mr. Tagive was not in his apartment at the time, he was calling Ms. Reed. As such, prosecution was creating a false picture to the jury based on a completely unsupported claim, but attempting to use the telephone records as authority for their assertion.

C.W. had testified that during the course of her sexual encounter with the Respondent during the early morning hours of October 20, 2013, that she was screaming and yelling no in such a manner that if Mr. Tagive was present in his bedroom in the apartment, he would hear her. (R.R.VIII 137-38). Because of this testimony by C.W., it was the prosecution's attempt to

place Mr. Tagive outside of the apartment so that his testimony that he did not hear anything the early morning hours of October 20, 2013 coming from his roommate's room would not be believed. (R.R.XI 14). The phone records were referenced during the State's closing argument by arguing that Mr. Tagive was making "calls all over town." (R.R.XI 197, 221).

This use of the telephone records by the prosecution and the cross examination of Ms. Reed violated the Respondent's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 Section 19 of the Texas Constitution. The Court of Appeals decision is well founded in the law and the facts of the case.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent prays that this Petition for Discretionary Review be in all things REFUSED.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Amended Reply to State's and Amici Curiae's Petition for Discretionary Review was forwarded to the District Attorney of McLennan County, Texas, and to the State Prosecuting Attorney, Austin, Texas, by electronic service on this the 27th day of August, 2019.

/s/WILLIAM A. BRATTON III
WILLIAM A. BRATTON III

CERTIFICATE OF COMPLIANCE

At the request of the Court, I certify that this submitted brief complies with the following requests of the Court:

1. This filing is labeled with or accompanied by the following information:

a. Case Style: **Samuel Ukwuachu v. State of Texas**
b. Case Number: PD-0776-19
c. The Type of Brief: **Reply to State's Petition for Discretionary Review**
d. The Word Processing Software and Version Used to prepare the filing: **pdf – Microsoft Office Word 2010**
e. This document contains 3,886 numbers of words.

2. The electronic filing is free of viruses, spyware, adware, rootkits, or any other similar data or files that would be disruptive to the Court's computer system. The following software, if any, was used to ensure the filing is in compliance: **Norton Antivirus**

/s/WILLIAM A. BRATTON III
WILLIAM A. BRATTON III
Attorney for Respondent

APPENDIX "A"

IN THE
TENTH COURT OF APPEALS

No. 10-15-00376-CR

SAMUEL UKWUACHU,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 54th District Court
McLennan County, Texas
Trial Court No. 2014-1202-C2

MEMORANDUM OPINION

Samuel Ukwuachu appeals from a conviction for the offense of sexual assault. TEX. PENAL CODE ANN. § 22.011. In six issues, Ukwuachu complains that his due process rights were violated due to the presentation of false testimony relating to cell phone records of his roommate during the State's cross-examination of his roommate's friend (issue one) and his roommate (issue two); that the indictment was defective; that evidence of an extraneous offense was improperly admitted; that his due process rights were

violated due to an abuse of the grand jury process by the State; and that text messages between the victim and a friend of hers the night of the alleged offense were improperly excluded. Because we find that Ukwuachu's due process rights were violated by the use of false testimony, we reverse the judgment of the trial court and remand for a new trial.[1]

INDICTMENT

Because the validity of the indictment would result in the greatest relief if granted, we will address that issue first. In his third issue, Ukwuachu complains that the indictment against him is facially insufficient for failing to allege the manner and means in which the lack of consent was obtained. Ukwuachu did not file a motion to quash the indictment prior to trial.

"The sufficiency of an indictment is a question of law." *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004). "[T]o comprise an indictment within the definition provided by the constitution, an instrument must charge: (1) a person; (2) with the commission of an offense." *Cook v. State*, 902 S.W.2d 471, 477 (Tex. Crim. App. 1995). "[A] written instrument is an indictment or information under the Constitution if it accuses someone of a crime with enough clarity and specificity to identify the penal statute under which the State intends to prosecute, even if the instrument is otherwise defective."

[1] We initially reversed the judgment based on the issue relating to the text messages; however, the Court of Criminal Appeals reversed our judgment and remanded this proceeding for us to consider Ukwuachu's other issues. *See Ukwuachu v. State*, 2018 Tex. Crim. App. Unpub. LEXIS 442, 2018 WL 2711167 (Tex. Crim. App. June 6, 2018).

Duron v. State, 956 S.W.2d 547, 550-51 (Tex. Crim. App. 1997). If the State fails to allege an element of an offense in an indictment or information, then this failure is a defect in substance. *Studer v. State*, 799 S.W.2d 263, 268 (Tex. Crim. App. 1990). The accused must object to substance defects before trial begins; otherwise the accused forfeits his right to raise the objection on appeal or by collateral attack. TEX. CODE CRIM. PROC. ANN. art. 1.14(b) ("If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding."); *Duron*, 956 S.W.2d at 550-51. Because Ukwuachu did not file a motion to quash the indictment in this proceeding, this complaint has been waived. We overrule issue three.

FALSE TESTIMONY

In his first and second issues, Ukwuachu complains that his due process rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 19 of the Texas Constitution were violated by the State's use of false testimony. The false testimony relates to Ukwuachu's roommate's location and whether phone calls were made around the time of the alleged offense. The complaint is that the false testimony was created by the way in which the State made use of his roommate's cell phone records, which were provided to Ukwuachu on the second day of the trial, but which were excluded from evidence.

Regardless of whether done knowingly or unknowingly, the State's use of material testimony that is false to obtain a conviction violates a defendant's right to due process under the Fifth and Fourteenth Amendments. *Ex parte Chavez*, 371 S.W.3d 200, 207-08 (Tex. Crim. App. 2012). The due-process inquiry is twofold: (1) was the testimony, in fact, false, and if so, (2) was the testimony material. *Ex Parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014). As to the falseness inquiry, the false testimony or evidence need not rise to the level of perjury to violate due process; it is sufficient if the testimony or evidence is "false." *Id.*, at 665-66. But whether the testimony is "false" is determined by asking whether the testimony, taken as a whole, "gives the jury a false impression." *Chavez*, 371 S.W.3d at 208. If the testimony is determined to be false, we must then determine whether the testimony was "material." *Weinstein*, 421 S.W.3d at 665. False testimony is material if there is a "reasonable likelihood" that it affected the judgment of the jury. *Id.* (*citing Chavez*, 371 S.W.3d at 206-07).

On the second day of trial, the State informed the trial court that it had just received Ukwuachu's roommate's cell phone records and had shown them to Ukwuachu's roommate and Ukwuachu's roommate's attorney. Ukwuachu objected to the records and was given a continuance for the afternoon to review the records and to speak with Ukwuachu's roommate regarding whether or not he would testify or whether he would invoke his Fifth Amendment right to not testify against himself. Based on what the phone records allegedly showed, Ukwuachu's roommate was threatened with perjury charges

by the State relating to grand jury testimony he had been forced to give shortly before trial if he were to choose to testify at trial consistent with his grand jury testimony.[2] Based on the time and location data shown in the phone records, the State argued that Ukwuachu's roommate was across town during the alleged assault rather than in their apartment as the roommate had testified before the grand jury. But the times shown in the phone records were in UTC (Coordinated Universal Time), which was five hours different from local time. Due to this five-hour difference in time for when the calls were made, Ukwuachu claimed that his roommate's testimony was not shown to be untrue by the records as argued by the State. The trial court did not allow the admission of the phone records but allowed the State to ask questions about making phone calls.

Notwithstanding the exclusion of the phone records, during its cross-examination of both Ukwuachu's roommate and Ukwuachu's roommate's friend, the State referred to the phone records as though they definitively showed that Ukwuachu's roommate was calling his friend from across town during the time when the roommate had testified he was in the apartment he shared with Ukwuachu. In addition to using the records during cross-examination, in its closing argument the State referenced the time and location data of the calls as showing that Ukwuachu's roommate was not in the apartment during the

[2] The State discovered Ukwuachu's roommate's cell phone number during grand jury testimony he was subpoenaed to provide a few weeks prior to Ukwuachu's trial. The alleged violation of Ukwuachu's due process rights relating to Ukwuachu's roommate's being forced to testify before the grand jury relating to this offense is the basis for Ukwuachu's fifth issue. The State used the information received from the grand jury to subpoena Ukwuachu's roommate's cell phone records and to impeach his roommate's testimony at trial.

alleged assault as Ukwuachu's roommate had testified.

At the motion for new trial hearing, Ukwuachu provided an affidavit by an expert in computer forensics who contended that it was impossible to accurately verify location data solely from the records without additional review by an expert, that the latitude and longitude given on this type phone records was rarely precisely accurate, and that it would take many hours for an expert to accurately provide the location of where an individual was when a call was made. The State had contended that it had just received the records from the cell phone provider during trial, although the State mentioned that its expert designated prior to trial had reviewed them.

We find that the State's repeated references to what the cell phone records showed, including the location and time of calls made, without their admission into evidence created a false impression with the jury.[3] Testimony was elicited from both Ukwuachu's roommate and Ukwuachu's roommate's friend while referencing records that were not in evidence and in a manner that indicated that the records definitively showed Ukwuachu's roommate's location at certain critical times when they did not.

We must next determine whether or not the testimony was "material," that being that there is a "reasonable likelihood" that it affected the judgment of the jury. *Chavez*, 371 S.W.3d at 206-07. If a due-process violation stemming from a use of material false testimony is found, harm is necessarily proven. *Weinstein*, 421 S.W.3d at 665.

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[3] We do not disagree with the trial court's exclusion of the records.

It was extremely important to the State's case to put the roommate outside the apartment at the time of the alleged assault. Ukwuachu's roommate testified that he was in the apartment prior to Ukwuachu returning home the night of the alleged assault, heard Ukwuachu and a female come into the apartment, and did not hear any sounds or signs of a struggle as the victim described in her testimony. The State went to great lengths to discredit Ukwuachu's roommate's testimony by showing his location at the time the phone calls were made using records the State could not get admitted into evidence.

This was a case where the central issue was consent. There was no dispute that sexual intercourse occurred. The credibility of Ukwuachu, the victim, and his roommate, who were the only persons potentially in the apartment, was the most significant aspect of the trial. The State's case was strengthened significantly by showing that Ukwuachu's roommate was not in the apartment or that he was making calls at times he had contended he was asleep based on records that the State knew it could not admit into evidence and that created a false impression. We find that there is a "reasonable likelihood" that the false impression affected the judgment of the jury. *Chavez*, 371 S.W.3d at 206-07. Because of this, we sustain issues one and two and reverse the judgment of the trial court and remand for a new trial. Because we are reversing the judgment and remanding for a new trial, it is not necessary for us to address Ukwuachu's other remaining issues. TEX. R. APP. P. 47.1.

CONCLUSION

Having found that the use of the cell phone records constituted a due process violation, we reverse the judgment of conviction and remand this proceeding for a new trial.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Reversed and remanded
Opinion delivered and filed July 10, 2019
Do not publish
[CR25]